UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AVI FOOD SYSTEMS, INC.
Employer

and 25-RC-259612

TEAMSTERS LOCAL UNION NO. 135
Petitioner

David T. Vlink, Esq, *Vlink Law Firm, LLC, Indianapolis, Indiana,* for the Petitioner
Steven V. Shoup, Esq., *Littler Mendelson, P.C., Indianapolis, Indiana,* for the Employer

REPORT ON OBJECTIONS

Arthur J. Amchan Administrative Law Judge. This matter was heard via Zoom video technology on September 23, 2020. In deciding this matter I have considered the post hearing briefs filed by the Employer and the Petitioner.[1]

The petitioner, Teamsters Local Union No. 135 hand-delivered a representation petition to Respondent's Seymour, Indiana facility on April 24, 2020. The Employer's headquarters is in Warren, Ohio. It has many facilities nationwide. From the Seymour facility, the employer services vending machines at customer locations. The Union seeks to represent a bargaining unit of all full-time and regular part-time warehouse employees, vending route drivers vending/delivery route drivers, delivery route drivers and general floaters employed by AVI Food Systems at the Seymour facility. The employer received an emailed copy of the petition and election Notice on April 27 from the NLRB's Regional Office

Along with the petition and election notice were instructions, including the following:

[1] While I observed the witnesses, I have not relied on demeanor evidence in making credibility determinations. Instead I have made credibility resolutions on the basis of the weight of the evidence, established or admitted facts, inherent probabilities and reasonable inferences drawn from the record as a whole, *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 635 (2011) cited in *St. Louis Cardinals,* 370 NLRB No. 31 fn. 3(October 6, 2020). Demeanor evidence, such as tone of voice, or gestures or posture, can be an unreliable clue to truthfulness or untruthfulness, and thus distract a trier of fact from the cognitive content of a witness's testimony, *United States v. Pickering,* 794 F.3d 802, 805 (7th Cir. 2015).

> Required Posting and Distribution of Notice: You must post the enclosed Notice of Petition for Election by April 29, 2020 in conspicuous places, including all places where notices to employees are customarily posted. The Notice of Petition for Election must be posted so all pages are simultaneously visible. If you customarily communicate with your employees electronically, you must also distribute the notice electronically to them. You must maintain the posting until the petition is dismissed or withdrawn or this notice is replaced by the Notice of Election. Posting and distribution of the Notice of Petition for Election will inform the employees whose representation is at issue and the employer of their rights and obligations under the National Labor Relations Act in the representation context. Failure to post or distribute the notice may be grounds for setting aside an election if proper and timely objections are filed.

On April 29, 2020 company officials met with legal counsel to discuss the Union's organizing drive. The employer and Union agreed to a mail ballot election, which began on May 19. All ballots were returned by June 9 and were counted June 12, 2020. There were approximately 24 eligible voters. 20 of these attempted to vote; 5 ballots were challenged. The challenges are not before me. Either they were overruled by the Regional Director or resolved by the parties prior to hearing.

15 valid votes were counted. 8 were cast against representation by the Union; 7 in favor of representation. On June 18, 2020 the Union filed 4 objections to conduct affecting the results of the election. The Regional Director overruled the Union's objection #2, but ordered a hearing on objections 1, 3 and 4.

Objection # 1

The Union asserts that the Employer failed to post the required Notice of Petition for Election within two (2) business days after the Region's service of the Notice of Hearing dated April 27, 2020. The employer emailed the notice to all unit employees, whose emails it possessed, on May 2, 2020. It did so in part because some unit employees had been furloughed due to the COVID 19 pandemic. It is not entirely clear whether all eligible voters received this email from the Employer. There is also a dispute as to where and when the Notice was posted physically at the Seymour plant. Unit employees testified that they never saw the Notice posted at least not until very recently.

Tom DePriest, Respondent's branch manager testified that he personally posted the Notice of Petition for Election on a bulletin board in the office area on April 30, 2020, Tr. 67. He further testified that a copy of the Notice was posted by Laura Poole, an AVI Senior Vice President on the bulletin board in the Seymour plant's warehouse on "what he believes the same day, April 30," Tr. 72-73. Respondent introduced a photo of the office bulletin board with the Notice. Chris Kaufman, a unit employee, testified that due to the COVID-19 pandemic, drivers and warehouse employees were not allowed to enter the office area. This testimony is uncontradicted and is therefore credited. The Employer did not introduce a photograph of the

bulletin board in the warehouse. Laura Poole, who is not based in Seymour, did not testify in this proceeding. Thus, there is no credible evidence that Poole was at the Seymour branch on April 30 or at anytime between April 30 and June 12, 2020, Tr. 123-24.

Molly Clark, the office supervisor at Seymour, testified that she has seen the Notice posted on the office bulletin board and on the bulletin board in the warehouse. Employment law notices, such as the OSHA poster are on the bulletin board in the warehouse, not on the board in the office area. Thus, failure to post the Election Notice on the bulletin board in the warehouse would fail to comply with the Region's written instructions even if it were posted on the bulletin board in the office.

Clark testified that she has seen the Notice on the bulletin board in the warehouse. However, her testimony does not establish that it was posted there prior to June 12, 2020. I find that it was not. Clark's relevant testimony is as follows:

> Q BY MR. VLINK: Ms. Clark, when was the first time that you actually looked to see whether that Notice was posted on those --
> A It was probably around the time it was first posted, at the end of April.
> Q At the end of April, you checked to see whether it was there?
> A Yes, because we were informed that it was posted.
> Q Okay. Where did -- which bulletin board did you look at?
> A That would be the one in the office. It is the one I see every day. It is right next to the restrooms.
> Q The one in the Warehouse, you don't see -- you don't see that at all?
> A I don't see it as often, no. But it is right there where the Drivers sit and do their paperwork.
>
> Tr. 110-111.

Kaufman testified that he did not see this Notice until August 2020. Phillip Elliott, another unit employee, also testified that he did not see the Notice on the bulletin board in the warehouse. In the absence of testimony from another unit employee stating that the Notice was posted as required on the warehouse bulletin board prior to the counting of ballots, I credit Kaufman and Elliott and find that the Notice was not posted there until after the ballots were counted. Board precedent establishes that "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest," *Flexsteel Industries,* 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996).

Objection #3

On May 14, 2020, the Employer discharged route driver Aaron Lucas. Lucas was an outspoken advocate for representation of unit employees by Teamsters Local 135. Lucas had spoken in favor of union representation at an all-hands meeting in front of AVI management personnel. On May 23, during the critical period between the filing of the representation petition and the balloting, the employer sent an email letter to unit employees explaining the reasons for which it discharged Lucas. It concedes that this was the first and only time it ever sent a letter to employees about the discharge of a fellow employee. The Union contends that the letter contained inflammatory language and unjustifiably suggested that Lucas had engaged in criminal conduct. The letter reads as follows:

May 14, 2020

Dear Valued AVI Team Member,

I hope that you are remaining healthy as this pandemic continues to interrupt our daily routines.

I would like to take a moment of your time to address the sudden and unfortunate termination of our fellow team member, Aaron Lucas. Please draw your attention to the attached images of a Facebook Messenger exchange from Wednesday, May 6, between Mr. Lucas and another individual to fully understand the grounds for our decision. It has been discovered that Mr. Lucas strongly requested an individual to intercept a family member's U.S. Postal mail from the National Labor Relations Board and steal the ballot. Furthermore, he indicates in the Facebook Messenger exchange that he wants a 100% unanimous decision. There are only two ways in which that could be achieved. Was he going to dispose of the stolen ballot? Or, was his intent to illegally vote the stolen ballot YES, forge the family member's signature and send the envelope back to the NLRB unlawfully completed? Regardless of how Mr. Lucas set out to achieve his goal, both ways were deceitful. While Mr. Lucas appears to have violated federal mail and wire fraud laws, he just as importantly corrupted the NLRB's Union Election Requirement that states the proceedings leading up to an election must be conducted under "laboratory conditions." Additionally, we strongly disagree with Mr. Lucas' assertion that the team member in question is ineligible to vote, because as a General Floater, this team member is definitely part of the unit as set forth in the petition for the election. That being said, the election process does provide for a resolution of this issue by challenging the ballot at the time of the ballot count.

Before dismissing Mr. Lucas of his responsibilities here at AVI Seymour, we confronted him with copies of the exact conversation you have attached to this communication. We then granted him an opportunity to provide an explanation. After thoroughly considering his response, we proceeded with our decision to discharge him.

Along with the usage of inappropriate and derogatory language, Mr. Lucas not only appears to have violated federal law, but infringes upon the very foundation AVI was built: integrity, excellence, sensitivity and accountability. According to our Core Values, we describe integrity as *honoring truth, fairness and honesty* ***above all else*** *and treating integrity as a constant and absolute*. As a family, together we strive to uphold these Core Values for the prosperity of our customers as well as our team members. Therefore, when Mr. Lucas blatantly ignored the culture in which we all believe, he simultaneously ignored YOU. He alone created an extremely distasteful environment that supports cheating, immoral and illegal activity, one that

AVI refuses to tolerate under any circumstances. We will not disregard or snub a person's unalienable right to freely cast a vote based on their independent opinion, and because of this, we made the difficult decision to terminate Mr. Lucas' employment with our company. Consequently, we also feel it is absolutely necessary to inform you of just how far Mr. Lucas was willing to go for his own personal gain.

Respectfully,
Tracie Mavrogianis
Vice President for Human Resources

The Union has not to date filed an unfair labor practice charge over Lucas' discharge and as a result the Regional Director sustained the employer's challenge to Lucas' ballot.

I recommend that this objection be overruled. Had the Employer done nothing, employees could well have been left with the impression that Aaron Lucas was fired for engaging in protected union activities. Some of them deduced that he had been fired when he stopped showing up for work, Tr. 46. The letter is not objectionable in attempting to dispel any such notion and informing unit employees that Lucas was, so far as this record shows, terminated for activity that is unprotected by the Act..

Objection #4

The Union contends that on May 23, 2020, Jeff Carpenter, the Warehouse supervisor, told employees that if they selected the Union, they would have to start working at 3:00 a.m. instead of their typical starting time of 6:00 a.m. In the hearing, Elliott Daniels, a warehouse employee with 15 years at AVI, testified that Carpenter told employees that if the Union won the representation election that they would have to come in early to unload product in the warehouse.

> He said if this passed, we would have to come in at 3:00 or 3:30 in the morning to unload the trucks, the big trucks, on a Saturday.
> Tr. 29.

Daniels sent a text message about this conversation to union organizer Dustin Roach on the afternoon of May 23.

Carpenter testified that as of May 23, he was 1 of 2 individuals certified to operate the sit-down forklift in the warehouse. Due to the disruptions caused by the COVID-19 pandemic, he was reporting to work earlier than normal, 3:30 a.m. on Saturdays. When Carpenter worked in management for another employer, which was unionized, managers were not allowed to operate the forklift. Carpenter told at least 4 employees that if the Union won the representation election, he would not be allowed to operate the forklift. Carpenter denies telling Elliott Daniels, Jacob Mendez, Alan Kaseras and Arath Kaseras[2] that if the Union won they would have to report at 3:30 a.m. rather than 6:00. He testified that he asked Jacob Mendez if he would like to come in at 3:30 a.m. to see how the product was unloaded at that time.

[2] According to the Union's brief the last name of these employees is Caceres.

Carpenter's testimony on this issue is as follows:

Now, on May 23rd, 2020, which was a Saturday, did you discuss forklift operation with any employees who were eligible to vote in the upcoming union election?
A Yes, I did.
Q And who were the employees you were discussing this with?
A There was Arath Kaseras *[Phonetic]*, Alan Kaseras, Jacob Mendez, and Elliott Daniels.
Q And what did you discuss?
A I asked them if they would be interested in driving a forklift.
Q Why did you ask them that?
A Because of my past experience at Ben Franklin, I didn't know how the outcome of this was going to be, and if it came out the way it was at Ben Franklin, Phil and myself would not be able to drive a forklift, so I needed another driver. My hands were tied.
Q And did you discuss this with these four individuals in a group?
A No, sir.
Q How -- how -- how did you discuss that?
A On the food line. As they would come by, I would ask them if they would be interested in driving a forklift.
Q And what was the responses?
A Elliott was "no I tried that in Madison and it didn't work out too well. Arath was, "No thank you." And I told Alan, I looked at him and said, "You are too uncomfortable to do it," and he said, "Correct." Then, Jacob said, "Yeah, I want to try."
Q And Jacob being Jacob Mendez.
A Correct.
Q And -- and so, when Jacob Mendez said, "Yeah, I would be interested," what did -- what did you respond?
A I told him, I said, "Would you like to come in next Saturday at 3:30 with me," and watch and observe how we do this walk him through it how we take stuff off the truck.
Q And what was his response?
A He said, "3:30!" And I said, "Well, don't worry about it." I said, "Well, maybe things will change," because the pandemic had things all jacked up, and the change of delivery times change constantly.
Q So, at any time, at any time, did you tell any employee that if the Union won the election, their

starting time was going to change, and they were going to have to come to work at 3:30 or 3:00 o'clock?
A No, sir.
Q At no time?
A No.

Tr. 142-44.

I credit Daniels for the following reasons. First of all, as a current employee his testimony contradicting his supervisor is likely to be accurate, *Flexsteel Industries, supra.* Secondly, his testimony is inherently plausible. Carpenter testified that at a prior employer, managers were not allowed to operate forklifts because they were not in the bargaining unit. It is reasonable to believe Carpenter also believed that would be the case if the Teamsters were selected by AVI employees at Seymour. It is also reasonable to believe that he communicated that to his reports. If that were the case, it follows that one or more of them would have to report at 3:30 and that Carpenter communicated that to his employees as well.. Of course, if the Union was selected, AVI would not be able to make a unilateral change in this situation while it bargained and whether managers could operate the forklift might depend on the terms of the parties' contract.

Applicable Legal Principles

It is well settled that "representation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.,* 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc*., 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB 637 (2014), citing *Polymers, Inc.,* 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970).

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." In making this determination the Board examines several factors: (1) the number of incidents; (2) the severity of the incidents and whether they are likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists on the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and, 9) the degree to which the misconduct can be attributed to the party. *Taylor Wharton Division*, 336 NLRB 157 (2001); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). Thus, under the Board's test the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the

employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

In this case, the closeness of the vote, the fact that Carpenter's conduct as warehouse supervisor is attributable to the employer and the fact that the conduct affected 4 of the approximately 24 eligible voters leads me to conclude that his statements tended to interfere with employees' freedom of choice. Therefore, I would order a new election solely on the basis of either objection # 1 or 4, and on the basis of objections 1 and 4 together.

As to objection # 1, the posting of election notices is a requirement established by the Board in rule making, see Section 103.20 of the Board's rules. This requirement is strictly enforced, i.e., a violation requires an election to be set aside if a proper and timely objection is filed, *Smith's Food and Drug,* 295 NLRB 983-84 n. 1 (1989); *Terrance Gardens Plaza, Inc.,* 313 NLRB 571, 572 (1993); *ELC Electric, Inc.* 344 NLRB 1200, 1217 (2005). Moreover, the record establishes that 4 eligible voters did not vote-enough to affect the outcome. The Notice of Election was not posted on the warehouse bulletin board as required; thus the Employer has not established that all unit members were likely to have seen it. Moreover, the record does not establish that all unit employees received the May 2 email or that they read it. It could well be that the Employer's failure to post the Election Notice as required could have affected the outcome of the election.

Conclusion

Based on the foregoing, I recommend that Petitioner's Objections 1 and 4 be sustained and the election be set aside. Further, I recommend that objection 3 be overruled.

APPEAL PROCEDURE

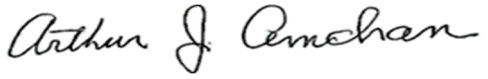
Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 25 by October 26, 2020 A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, 575 North Pennsylvania Street, Room 238, Indianapolis, IN 46204-1577

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business at 4:30 p.m. on the due date. If E-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated: October 13, 2020



Arthur J. Amchan
Administrative Law Judge